

United States Armed Intervention in Nicaragua and Article 2(4) of the United Nations Charter†

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The United States of America is using armed force against Nicaragua and intervening in Nicaragua's internal affairs on a daily basis. Since 1981, the U.S. has been waging a "covert" war against Nicaragua both in violation of Nicaragua's sovereignty, territorial integrity and political independence, and in violation of the most fundamental and universally accepted principles of international law. From a legal standpoint, at the minimum, the U.S. war against Nicaragua violates Article 2(4) of the United Nations Charter, which outlaws the use of force as an instrument of national policy in international relations. Article 2(4) provides as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."¹ This prohibition was the Charter's great departure from previous efforts to establish an international rule of law.² It is the cornerstone of the normative and institutional system established by the Charter. It has come to be recognized as *ius cogens*—an overriding and unmodifiable prohibitory norm.³

† This Article is based in part on the Memorial submitted by Nicaragua to the International Court of Justice for consideration of the merits of Nicaragua's claim against the United States. Memorial of Nicaragua, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1985 I.C.J. Pleadings (Memorial presented Apr. 30, 1985) (on file with the *Yale Journal of International Law*).

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1. U.N. CHARTER art. 2, para. 4.

2. See, e.g., LEAGUE OF NATIONS COVENANT art. 10 ("The members of the League undertake to repect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression . . . the Council shall advise upon the means by which this obligation shall be fulfilled."). But see General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), *opened for signature* Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 2137.

3. Former President of the International Court of Justice Jimenez de Arechaga has written, "[t]he paramount commitment of the Charter is Article 2, paragraph 4, which prohibits the threat or use of force in international relations. This is the cardinal rule of international law and the cornerstone of peaceful relations among States." Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 HAGUE RECUEIL 9, 87 (1978). For a comment on the prescriptive force of Article 2(4), see LORD McNAIR, *THE LAW OF TREATIES* 217 (1961) (Article 2(4), among other provisions of the Charter, "purport[s] to create legal rights and duties [and] possess[es] a constitutive or semi-legislative character, with the result that . . . member States cannot 'contract out' of [it] or derogate from [it]").

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Article 2(4) was designed in part to prevent the type of trans-border aggression that occurred in the recent world wars, but it was not confined to this use. It had already become apparent at the time the Charter was adopted that states, particularly the most powerful states, had the wherewithal for imposing their will on others by force, or by the threat of force. The United States, the most powerful state, has sought to impose its will on Nicaragua—in President Reagan's words, to force Nicaragua to "say Uncle"⁴—by attacks conducted by U.S. personnel and by U.S. direction, support, and control of the mercenaries known as the *contras*. These actions by the United States clearly violate Article 2(4).

It is the purpose of this Article to demonstrate, factually and legally, how the U.S.-sponsored activities against Nicaragua violate Article 2(4). Part I of this Article outlines the factual history, from 1981 to the present, of the U.S. role in the funding, planning, and engagement of armed force against Nicaragua. Part II analyzes the legal components of Nicaragua's charge that the U.S. actions violate Article 2(4). Specifically, this section will show that the U.S. has used force against the territorial integrity and political independence of Nicaragua within the meaning of Article 2(4): (a) through the activities of its own military and intelligence personnel; (b) by its actions in recruiting, organizing, training, supplying, directing, and controlling a mercenary army whose activities have included continuous and systematic depredations into the territory of Nicaragua with the object of overthrowing the government; and (c) in adopting and ratifying the actions of the mercenary forces. Part III demonstrates that the U.S. actions are not legitimate under Article 51 of the UN Charter as an exercise of the right of self-defense. Finally, part IV concludes that there is no other legal justification for these actions in contravention of Article 2(4).

I. Historical Background

The general outlines of the U.S. covert war against Nicaragua are beyond dispute. United States armed forces and intelligence personnel have mined Nicaragua's ports and conducted air and naval attacks on targets within the territory of Nicaragua and within its territorial waters, including attacks on oil storage tanks, pipelines, port facilities, and merchant ships. The U.S. has also created an army of roughly 15,000 mercenaries (many of whom served the former dictator Anastasio Somoza Debayle), installed them in base camps in Honduras along the

4. President's News Conference of Feb. 21, 1985, 21 WEEKLY COMP. PRES. DOC. 213 (Feb. 21, 1985).

border with Nicaragua, trained them, paid them, supplied them with arms, ammunition, food, and medical supplies, and directed their attacks against human and economic targets inside Nicaragua. The U.S. has openly acknowledged spending approximately \$100 million on these illegal activities since 1981.⁵

At first, U.S. activities against Nicaragua were undertaken "covertly." The intent was not to conceal them from Nicaragua, which could not be unaware of repeated attacks across its own borders. Rather, the intent was to hide the involvement of the U.S. from its own people and from the world. This is in itself an implicit acknowledgement that these activities cannot withstand legal or public scrutiny.

The objective of the United States' activities against Nicaragua is to overthrow the Nicaraguan government. This has been true from the outset and was publicly acknowledged as early as July 1983, when the Chairman of the House Permanent Select Committee on Intelligence, which oversees the "covert activities" against Nicaragua, reported to his fellow legislators that "the purpose and the mission of the operation was to overthrow the government in Nicaragua."⁶

President Reagan, in November 1981, authorized the Central Intelligence Agency (CIA) to recruit, train, supply, and direct a 1500-man mercenary force to conduct hit-and-run raids against selected Nicaraguan targets; \$19,950,000 was then allotted for such purposes.⁷ By December 1982, not only was an additional \$30 million allocated to the program, but the force had also grown to 4,000 men, and the attacks against Nicaraguan territory were occurring on an almost daily basis.⁸ By February 1983, the force had grown to 5,500 men.⁹ This number increased to 7,000 by May 1983,¹⁰ and to 10,000 by July 1983.¹¹ By the spring of 1983, the hit-and-run raids had grown to large-scale assaults intended to capture portions of Nicaraguan territory and establish a "provisional government."¹²

In September 1983, President Reagan authorized a further expansion of the force to 12,000-15,000 men and a shift in tactics to emphasize destruction of vital economic "targets."¹³ Another \$24 million was

5. See *infra* notes 7-22 and accompanying text (\$20 million in 1981, \$30 million in 1982, \$24 million in 1983, and \$27 million in 1985).

6. 129 CONG. REC. H5748 (daily ed. July 27, 1983) (statement of Rep. Boland).

7. Wash. Post, Mar. 10, 1985, at A1, col. 5.

8. Wash. Post, May 8, 1983, at A11, col. 1.

9. Wash. Post, May 8, 1983, at A11, col. 3.

10. *Id.*

11. Wash. Post, July 14, 1983, at A1, col. 6.

12. Wash. Post, Nov. 27, 1984, at A14, col. 3.

13. Wall St. J., Mar. 6, 1985, at 20, col. 1.

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appropriated to finance these activities.¹⁴ United States armed forces and intelligence personnel then began to carry out air and naval attacks against designated Nicaraguan economic installations. More than nineteen such attacks were carried out in the first three months of 1984.¹⁵ During the same period, United States armed forces and intelligence personnel mined Nicaragua's three main ports: Corinto, Puerto Sandino, and El Bluff.¹⁶ At least eight ships—five from third-party states—were damaged or destroyed by exploding mines.¹⁷ As a result, Nicaragua's capacity to carry on peaceful maritime commerce was seriously impaired.¹⁸

In 1984 a supplemental source of funding for these activities was introduced. Private individuals and groups within the United States were encouraged by the Reagan Administration to contribute financial and material support to the mercenary army. More than \$5 million was raised in this manner,¹⁹ and private "volunteers," encouraged and assisted by the Administration, began to provide support for the mercenaries.²⁰

During 1984, attacks by mercenary forces and United States personnel resulted in the death of 1,265 Nicaraguans, and in the destruction of capital facilities and production valued at more than \$180 million. These figures were significantly higher than in any previous year.

In June 1985, President Reagan persuaded the Congress to appropriate another \$27 million in aid,²¹ euphemistically termed "humanitarian," but in reality designed to carry on the military and paramilitary activities against Nicaragua until at least September 30, 1986. Even as this Article is being written, the Administration has resumed its campaign for an additional \$100 million in aid to the mercenaries, including \$70 million in outright military aid.²² Indeed, President Reagan has made it clear that the United States will continue to support its mercenary army no matter what happens. When asked, "if the Congress [refused to appropriate more funds], will you look for some other avenue to help the

14. TIME, Apr. 23, 1984, at 19.

15. Wall St. J., Mar. 6, 1985, at 1, col. 1.

16. *Id.*

17. TIME, Apr. 23, 1984, at 19-20.

18. See, e.g., N.Y. Times, Apr. 12, 1984, at A11, col.1 ("Two shipping companies have stopped sailing to Nicaraguan ports as a result of the mining of the three main ports . . .").

19. Wall St. J., Mar. 6, 1985, at 1, col. 1.

20. See Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 1540, 98 Stat. 2492, 2637-38 (1984) (which permits the Defense Department to assist private groups by sending donated supplies to Central America on military transport vehicles).

21. Act of Aug. 15, 1985, Pub. L. No. 99-88, ch. V, 99 Stat. 293, 324-25 (1985).

22. President's Message to the Congress, Feb. 25, 1986, 22 WEEKLY COMP. PRES. DOC. 266 (Mar. 3, 1986).

contras, some other way to continue your desire to see a restructuring of the Nicaraguan Government,” President Reagan responded, “we’re not going to quit and walk away from them no matter what happens.”²³

In fact, President Reagan has openly announced that the use of U.S. troops against Nicaragua is under consideration. A White House report to Congress on April 3, 1985 stated: “Direct application of United States military force, . . . must realistically be recognized as an eventual option, given our stakes in the region, if other policy alternatives fail.”²⁴

It should be remembered that the United States has taken these actions even though it is officially at peace with Nicaragua. No state of war exists between the two countries. The United States recognizes the present government of Nicaragua as the legitimate government, and the two states maintain full diplomatic relations. Nevertheless, the United States has waged a relentless “covert” war against Nicaragua for over four years.

The foregoing evidence demonstrates the broad extent of United States actions against Nicaragua. As will be shown, these actions constitute the threat and use of force in violation of Article 2(4) of the United Nations Charter, for which the United States is liable under international law.

II. The Use of Force

A state violates Article 2(4) when it uses force or a threat of force “against the territorial integrity or political independence” of another state. The actions of the United States constituting the use of force against Nicaragua are described below.

A. *Direct Action by United States Personnel*

In the first instance, U.S. armed forces and intelligence agents, of both U.S. and Latin American nationality, have been involved in numerous direct actions against Nicaragua. A few of the most egregious examples are summarized below.

The mining of Nicaraguan harbors in early 1984 was a U.S. operation from start to finish. The operation was approved by President Reagan on the recommendation of White House National Security Advisor Robert C. McFarlane. The actual mines were constructed in the United States by the CIA and the U.S. Navy and were assembled in Honduras by CIA

23. Remarks Announcing the Central American Peace Proposal, Apr. 4, 1985, 21 WEEKLY COMP. PRES. DOC. 418 (Apr. 8, 1985).

24. N.Y. Times, Apr. 17, 1985, at A1, col. 5.

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weapons specialists.²⁵ From a “mother ship”²⁶ positioned off the coast of Nicaragua, U.S. military and intelligence personnel, including Latin American commandos from third countries hired and trained by the CIA, deployed the mines in Nicaragua’s harbors.²⁷ As Senator Barry Goldwater wrote in a letter to CIA Director William J. Casey dated April 9, 1984, “the CIA had, with the written approval of the President,” engaged in mining the Nicaraguan harbors. Senator Goldwater concluded: “This is an act violating international law. It is an act of war. For the life of me, I don’t see how we are going to explain it.”²⁸

A similar pattern of direct involvement of U.S. personnel marked a series of raids on Corinto and other Nicaraguan ports in the early months of 1984. Indeed, these attacks were staged from the same “mother ship” used in the mining operations. During this period, United States military personnel operated helicopters in combat against Nicaraguan positions, while supplying air cover for commando raids against Nicaraguan ports, harbors, and oil storage facilities.²⁹

United States aircraft have also systematically violated Nicaraguan airspace to conduct surveillance and to carry supplies to mercenary forces. Jeane Kirkpatrick, then U.S. Ambassador to the United Nations, acknowledged in a UN Security Council debate that as early as the beginning of 1983, the United States was conducting regular reconnaissance flights over Nicaraguan territory.³⁰

These direct incursions of U.S. personnel have been accompanied by a continuous and deliberate campaign of intimidation by regular U.S. land, naval and air forces along the borders of Nicaragua and in the seas off its coast. This campaign has included a series of major maneuvers lasting weeks or months and employing thousands of U.S. ground forces. This campaign also involved almost continuous patrolling by naval task forces and aircraft carrier groups, and the construction of permanent bases, camps and airfields for these forces. U.S. military officers have reported that U.S. armed forces are fully prepared, from a technical and logistical

25. N.Y. Times, June 1, 1984, at A4, col. 3.

26. Wall St. J., Mar. 6, 1985, at 20, col. 1.

27. N.Y. Times, Apr. 16, 1984, at A1, col. 5.

28. 130 CONG. REC. H2558-59 (daily ed. Apr. 11, 1984).

29. Wall St. J., Mar. 6, 1985, at 20, col. 1 (publishing portions of an internal CIA memorandum).

30. See 37 U.N. SCOR (2335th mtg.) at 48, U.N. Doc. S/P.V. 2335/corr.1 (1982). Such flights were conducted by UH-1H helicopters, RC 135, U2, C-47, C-130 and AC-37 planes, as well as by low-flying U.S. SR-71 Blackbirds that were deliberately used to cause sonic booms and to intimidate the population. See N.Y. Times, Apr. 3, 1983, at A1, col. 6.

standpoint, to carry out missions against Nicaragua.³¹ The Administration has announced that these maneuvers will continue at least through 1988. The purpose of these activities has not been hidden. At the highest levels, U.S. officials have repeatedly avowed that their intent is to put "pressure" on the Nicaraguan government.³² Indeed, in an example of Orwellian "newspeak," U.S. officials have denominated this activity a campaign of "perception management,"³³ designed to keep the Nicaraguan government and people in fear of a direct invasion by official U.S. military forces. These maneuvers constitute what the International Court of Justice (I.C.J.) in the *Corfu Channel Case* termed a "demonstration of force for the purpose of exercising political pressure."³⁴

Direct military action against Nicaragua, conducted by military and civilian personnel in the official service of the United States, constitutes a use of "armed force" under Article 2(4) of the United Nations Charter, for which the United States is accountable. The actions of military and civilian personnel of the United States in the line of duty and under the direction of their superiors constitute, under law, the actions of the United States. Indeed the acts and omissions of all state organs or agents are attributable to the state.³⁵ Thus, military activities conducted by members of the armed forces of the United States or by other officers or employees of the United States must be considered acts of the United States for the purpose of determining its liability under international law.

Codes on international responsibility, prepared by bodies of experts and individual jurists alike, uniformly accept the principle that the use of force by organs or agents of a state becomes attached to that state for purposes of determining the legal responsibility of the state. Among these codes, the most authoritative is the International Law Commission's draft Articles on State Responsibility.³⁶ Article 5 of that draft states: "For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question."³⁷ Article 6 continues:

31. See Wash. Post, Feb 18, 1986, at A1, col. 1.

32. Wash. Post, July 22, 1983, at A1, col. 6.

33. N.Y. Times, Mar. 30, 1985, at A1, col. 2.

34. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Judgment of Apr. 9).

35. See Ago, Third Report to the International Law Commission, [1971] 2 Y.B. INT'L L. COMM'N 199, 246, U.N. Doc. A/CN.4/SER.A/1971/Add.1 (Pt. One).

36. See Report of the International Law Commission to the General Assembly, [1973] 2 Y.B. INT'L LAW COMM'N 161, 173-98, U.N. Doc. A/CN.4/SER.A/1973/Add.1.

37. *Id.* at 191.

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The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.³⁸

The work of the International Law Commission simply reiterates long-standing principles of international jurisprudence. As early as 1926, for example, a draft Code of International Law prepared by Kokusaiho Gakkwai provided in its first article that a state is liable for any "willful act, default or negligence of the official authorities in the discharge of their official functions."³⁹

And finally, as might be expected, the United States itself fully acknowledges the principle that a state is liable for the use of force by its officers or agents in violation of international law. In its "General Rule as to Attribution" (of conduct to the state), the *Restatement (Second) of Foreign Relations Law* states:

Conduct of any organ or other agency of a state or of any official, employee, or other individual agent of the state or of such agency, that causes injury to an alien, is attributable to the state . . . if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.⁴⁰

Since there is abundant evidence of pervasive direct participation by U.S. forces and employees in attacks on Nicaragua, most of it publicly admitted by responsible officials of the United States government, it follows that the rule holding a state legally accountable for the use of force by its organs or agents is squarely applicable to the United States, and thus that the United States has illegitimately used force against Nicaragua within the meaning of Article 2(4).

B. *U.S. Support, Direction, and Control of the Mercenaries*

From at least November 1981 to the present, the United States has provided massive support to the "armed bands" operating continuously

38. *Id.* at 193. See also 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School, art. 15, [1969] 2 Y.B. INT'L L. COMM'N 145, U.N. Doc. A/CN.4/SER.A/1969/Add.1 (the state is liable for "the act or omission of any organ, agency, official or employee of the State acting within the scope of the actual or apparent authority or within the scope of the function of such organ, agency, official or employee.").

39. 1926 Draft Code of International Law, [1969] 2 Y.B. INT'L L. COMM'N 141, U.N. Doc. A/CN.4/SER.A/1969/Add.1. For other examples of codes prepared by individual jurists, see [1969] 2 Y.B. INT'L L. COMM'N 151-52, U.N. Doc. A/CN.4/SER.A/1969/Add.1.

40. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 169 (1965).

against the territory of Nicaragua. The aggregate amount of U.S. assistance to the mercenary forces during this period, as admitted by official U.S. sources, is not less than \$97 million.⁴¹ This assistance began with the recruitment of the mercenaries and extends to the overall direction and control of their military and political strategy, the selection of military and political leaders, their training—including instruction in terrorist tactics against Nicaraguan civilians—the construction and maintenance of bases, logistical and intelligence support of operations inside Nicaragua, and the planning of particular operations. Moreover, the activities of the mercenary forces have been openly adopted and ratified by President Reagan and other high U.S. officials.

The writings of jurists, the actions of the United Nations and the positions taken by the United States itself are in agreement that such use by a State of armed groups of mercenaries or irregulars to carry out acts of armed violence against another state violates the prohibition on the use of force contained in Article 2(4). This position finds support, as well, in the pronouncements of the International Court of Justice.

1. The Writings of Publicists

It is an elementary principle of international law that the direction and control of armed bands by a state is attached to that state for purposes of determining liability. The principle has been codified in draft form by the International Law Commission. Article 8 of the draft Articles on State Responsibility reads: "The Conduct of a person or group of persons shall also be considered as an act of the State under international law if (a) it is established that such person or group of persons was in fact acting on behalf of that State. . . ."⁴²

Publicists in international law agree on this attribution of the acts of an agent to the state.⁴³ Only a few of the most prominent authorities are mentioned here. For example, Ian Brownlie notes that the terms "use of force" and "resort to force," while frequently employed by writers, have not undergone detailed analysis.⁴⁴ His own analysis, based on a survey of the literature, concludes that:

41. See *supra* note 5.

42. Draft Articles on State Responsibility, [1974] 2 Y.B. INT'L L. COMM'N 277, U.N. Doc. A/CN.4/SER.A/1974/Add.1 (Part One).

43. See, e.g., Ago, *supra* note 35, at 266, which states:

The attribution to the State, as a subject of international law, of the conduct of persons who are in fact operating on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function) is unanimously upheld by the writers on international law who have dealt with this question.

44. I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 361 (1963).

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There can be little doubt that “use of force” is commonly understood to imply a military attack, an “armed attack”, by the organized military, naval, or air forces of a state; but the concept in practice and principle has a wider significance. The agency concerned cannot be confined to the military and other forces under the control of a ministry of defence or war, since the responsibility will be the same if a government acts through “militia”, “security forces”, or “police forces” which may be quite heavily armed and may employ armoured vehicles. Moreover, governments may act by means of completely “unofficial” agents, including armed bands, and “volunteers”, or may give aid to groups of insurgents in the territory of another state.⁴⁵

Brownlie notes further that, although sporadic operations by armed groups might not amount to armed attack, “it is conceivable that a co-ordinated and general campaign by powerful bands or irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an ‘armed attack’”⁴⁶

Rosalyn Higgins also takes the position that the use of irregulars to carry out armed attacks against another state is, “from a functional point of view,” a use of force.⁴⁷ She develops the historical background for the growing emphasis on indirect uses of force in UN practice. At the San Francisco Conference, she points out, the focus was on conventional methods of armed attack, but “the unhappy events of the last fifteen years” necessitated a substantial reevaluation of the concept of the use of force.⁴⁸ Thus, the “‘law-making’ activities” of the General Assembly and the International Law Commission, defining and outlawing indirect aggression, did not take place *in vacuo*, but arose from continuing efforts to define aggression, the Nuremberg principles, and the stream of incidents confronting the Security Council and the General Assembly.⁴⁹

45. *Id.* (emphasis added) (footnotes omitted).

46. *Id.* at 278-79. Hans Wehberg reached the same conclusion in 1951. The application of “physical” force, he maintained, is necessary for a violation of Article 2(4), but physical force must be defined to include certain forms of indirect aggression:

[L]a force armée peut être utilisée non seulement directement, mais aussi indirectement, par un “appui fourni aux bandes armées formées sur le territoire d’un Etat et pénétrant dans le territoire d’un autre Etat.” Tolérer la formation de telles expéditions, ou aider une révolution qui a éclaté dans un autre pays, constitue à n’en pas douter un cas d’emploi *indirect* de la force armée.

Il faut donc en tous cas, d’après l’art. 2, par. 4, un recours à la “physical force”.

Wehberg, *L’interdiction du recours à la force; le principe et les problèmes qui se posent*, 78 HAGUE RECUEIL 1, 68-69 (1951) (footnote omitted).

47. Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, 37 BRIT. Y.B. INT’L L. 269, 278 (1961).

48. *Id.* at 288-89.

49. *Id.* at 290.

Ahmed Rifaat also describes this evolving recognition of the dangers of indirect uses of force. He points out that since 1945 states have with growing frequency used armed bands and other covert uses of force in an attempt to circumvent the prohibitions of Article 2(4).

States, while overtly accepting the obligation not to use force in their mutual relations, began to seek other methods of covert pressure in order to pursue their national policies without direct armed confrontation.

The incompatibility of the classical external armed aggression with the present rules regulating international relations, led to the development of other methods of covert or indirect aggression.⁵⁰

These other covert methods include "subversion, fomenting of civil strife, aiding armed bands or the sending of irregulars to assist rebel groups in the target State."⁵¹

Thus, there is now virtually an unanimous modern view concerning indirect use of force through armed groups of mercenaries or irregulars. Any legal doubts that may have existed prior to World War II were dispelled by the events of the post-war period. If the prohibition on the use of force in Article 2(4) is to have any meaning, it must cover this new and dangerous mode of military activity by armed mercenaries and irregulars. As Novogrod writes, "to argue that direct and indirect aggression could not equally be violations of Article 2(4) of the Charter would be to make a fetish of literalism."⁵²

2. The Position of the United States

The United States has consistently been among the most forceful advocates of the view that the use of armed groups by a state to carry out military activities against another State amounts to a use of force. As early as 1947, U.S. Representative Austin, in a statement to the Security Council, condemned the support provided to guerrillas in Greece:

I do not think that we should interpret narrowly the "Great Charter" of the United Nations. In modern times, there are many ways in which force can be used by one State against the territorial integrity of another. Invasion by organized armies is not the only means for delivering an attack against a country's independence. Force is effectively used today through devious methods of infiltration, intimidation and subterfuge.

But this does not deceive anyone. No intelligent person in possession of the facts can fail to recognize here the use of force, however devious the

50. A. RIFAAT, *INTERNATIONAL AGGRESSION* 217 (1979).

51. *Id.* See also Novogrod, *Indirect Aggression*, in 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 199 (M. Bassiouni & V. Nanda eds. 1973); E. ARONEANU, *LA DEFINITION DE L'AGRESSION* 89-91 (1958); Piotrowski, *Où en Sommes-Nous Sur le Problème de l'Aggression*, 35 *REVUE DE DROIT INTERNATIONAL* 411, 415 (1957).

52. Novogrod, *supra* note 51, at 227.

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subterfuge may be. We must recognize what intelligent and informed citizens already know. Yugoslavia, Bulgaria and Albania, in supporting guerrillas in northern Greece, have been using force against the territorial integrity and political independence of Greece. They have in fact been committing acts of the very kind which the United Nations was designed to prevent, and have violated the most important of the basic principles upon which our Organization was founded.⁵³

Similarly, in 1969, John Lawrence Hargrove, the U.S. Representative to the Special Committee on the Question of Defining Aggression, stated:

The Charter . . . does not differentiate among the various kinds of illegal force There is simply no provision in the Charter, from start to finish, which suggests that a State can in any way escape or ameliorate the Charter's condemnation of illegal acts of force against another State by a judicious selection of means to its illegal ends.⁵⁴

The same view was espoused in 1973 by Judge Schwebel, currently a member of the I.C.J., who also served as U.S. Representative to the Special Committee on the Question of Defining Aggression. Writing a year before the Definition of Aggression was adopted, he affirmed "that the Charter of the United Nations makes no distinction between direct and indirect uses of force," and argued that the "most pervasive forms of modern aggression tend to be indirect ones."⁵⁵ Judge Schwebel then referred to the frequently cited *Report of the Secretary-General* which states that "[t]he characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative."⁵⁶

3. The Practice of United Nations

The consistent practice of the United Nations confirms the proposition that substantial involvement in the activities of armed insurgent groups is a violation of the prohibition against the use of force in Article 2(4). The UN concerned itself from the outset with the definition and elaboration of the concept of "the use of force" contained in the Charter. A series of resolutions and other actions defining or condemning the use of force and aggression shows a gradual evolution from the general characterization of support for insurgent groups as unlawful to specific condemnations

53. 2 U.N. SCOR (147th and 148th mtgs.) at 1120-21 (1947).

54. Statement by John Lawrence Hargrove, United States representative to the Special Committee on the Question of Defining Aggression, Mar. 25, 1969, in Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 HAGUE RECUEIL 411, 458 (1972).

55. *Id.*

56. *Id.* at 455-56 (quoting the Report of the Secretary-General, U.N. Doc A/2211, at 72).

invoking Article 2(4). The Draft Declaration on the Rights and Duties of States, adopted by the International Law Commission in 1949, imposed a duty on states "to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."⁵⁷ Similarly, the Commission's Draft Code of Offences against the Peace and Security of Mankind included among the enumerated offenses:

(4) The incursion into the territory of a State from the territory of another State by armed bands for a political purpose.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.⁵⁸

The General Assembly, too, has repeatedly condemned the use of force by states acting through insurgent groups. In its 1950 Peace Through Deeds Resolution, the Assembly denounced "the intervention of a State in the internal affairs of another State for the purpose of changing its legally established government by the threat or use of force."⁵⁹ The Resolution went on to say: "[W]hatever the weapon used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a Foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world."⁶⁰

The Assembly's position on the use of armed insurgent groups was further refined in the 1970 Declaration concerning Friendly Relations and Co-operation among States.⁶¹ The first principle enunciated in the Declaration is the prohibition against the use of force, including the very forms of involvement with the activities of armed bands that characterize the U.S. relationship with the *contras*:

57. Report of the International Law Commission to the General Assembly, art. 4, 4 U.N. GAOR Supp. (No. 10) at 8, U.N. Doc. A/925 (1949).

58. Draft Code on Offenses against the Peace and Security of Mankind, Report of the International Law Commission to the General Assembly, 9 U.N. GAOR Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954), *reprinted in* [1954] 2 Y.B. INT'L L. COMM'N 112, U.N. Doc. A/CN.4/SER.A/1954/Add.1.

59. G.A. Res. 380, 5 U.N. GAOR Supp. (No. 20) at 13, U.N. Doc. A/1775 (1950).

60. *Id.* See also Essentials of Peace Resolution, G.A. Res. 290, U.N. Doc. A/1251 at 13 (1949); 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11-12, U.N. Doc. A/6014 (1965).

61. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) (adopted without vote on Oct. 24, 1970) [hereinafter cited as Declaration Concerning Friendly Relations].

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Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.⁶²

The United Nation's development of principles in this area culminated with the adoption in 1974 of Resolution 3314, a Definition of Aggression.⁶³ Article 1 of the Definition defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State."⁶⁴ Thus the Definition of Aggression is again directly and explicitly related to the use of force prohibited by Article 2(4) of the Charter. Article 3 of the Definition specifies certain acts that shall "qualify as an act of aggression," i.e., that constitute the use of force in violation of Article 2(4). Among these, and of specific application in the present context, Article 3(g) includes: "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."⁶⁵

The Soviet Union made a proposal to include subparagraph 3(g) under the separate label of "indirect aggression."⁶⁶ In the final Definition, however, subparagraph 3(g) was included without differentiating it from other, more overt forms of aggression. The Special Committee accepted

62. *Id.* at 123. According to Judge Lachs of the I.C.J., "indirect means of attacking States were barred" by this Declaration. Lachs, *The Development and General Trends of International Law in Our Time*, 169 HAGUE RECUEIL 10, 166 (1980). Similarly, former President of the I.C.J. Jimenez de Arechaga asserts that the 1970 Declaration concerning Friendly Relations constitutes an "important interstitial development of some of the implications of Article 2(4)." Jimenez de Arechaga, *supra* note 3, at 93. He finds the origins of the Declaration in the increasing use of methods of indirect aggression since 1945, in the sense of "the sending of irregular forces or armed bands or the support or encouragement given by a government to acts of civil strife in another State." *Id.* Recognizing that "these acts may involve the use of force," he argues that the purpose of the Declaration was simply to prevent states from doing "indirectly what they are precluded by the Charter from doing directly." *Id.*

63. Definition of Aggression, G.A. Res 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc A/9631 (1974) (endorsed by the Sixth Committee (Legal), and adopted by the General Assembly by consensus on Dec. 14, 1974).

64. *Id.* at 143.

65. *Id.* See also Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, 36 U.N. GAOR Supp. (No. 51) at 78, U.N. Doc. A/36/51 (1981).

66. Draft Proposal Submitted by the U.S.S.R., Report of the Special Committee on the Question of Defining Aggression, 25 U.N. GAOR Supp. (No. 19) at 56, U.N. Doc. A/8019 (1970).

the proposition that the UN Charter provides no basis for distinguishing between a state using force by acting on its own and a state using force by acting through armed insurgent groups.⁶⁷ The Definition thus condemns the sending of armed bands as a use of force on par with direct invasion, bombardment, blockade, or other traditional notions of armed aggression.⁶⁸

4. The Criteria for State Liability

Subparagraph 3(g) of the UN Definition of Aggression specifically covers both the sending of armed bands "by or on behalf" of a state, and "substantial involvement" in the acts of armed groups. This outcome was a compromise between the position of the Western states, led by the United States, and the position of several Third World countries. The U.S. originally insisted that the prohibition only against the "sending" of armed groups was too narrow.⁶⁹ An earlier Western draft would have condemned, as well, the "[o]rganizing, supporting or directing of armed bands or irregular or volunteer forces that make incursions or infiltrate into another State."⁷⁰ Similarly, in 1972 the U.S. proposed adding the following to the list of examples of the use of armed force:

The organization by a State, or encouragement of the organization of, or assistance to, irregular forces or armed bands or other groups, volunteers, or mercenaries, which participate in incursions into another State's territory or in the carrying out of acts involving the use of force in or against another State, or knowing acquiescence in organized activities within its own territory directed toward and resulting in the commission of such acts.⁷¹

Many nations of the Third World, in contrast, objected to such an expansive prohibition on aid to armed bands; they sought to include in 3(g) only the actual sending of armed groups against another state.⁷² If 3(g) was read too broadly, these nations feared it might condemn assistance to indigenous groups engaged in struggles for self-determination against colonial powers.⁷³

67. See Declaration concerning Friendly Relations, *supra* note 61; see also J. STONE, CONFLICT THROUGH CONSENSUS: UNITED STATES APPROACHES TO AGGRESSION 89 (1977).

68. Definition of Aggression, *supra* note 63, art. 3.

69. See 2 B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION 39 (1975).

70. Draft Proposal submitted by Australia, Canada, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, Report of the Special Committee on the Question of Defining Aggression, 25 U.N. GAOR Supp. (No. 19) at 60, U.N. Doc. A/36/51 (1981).

71. 28 U.N. GAOR Supp. (No. 19) at 22-23, U.N. Doc. A/9019 (1973).

72. See Report of the Sixth Committee, 28 U.N. GAOR Annex (Agenda Item 95) para. 22, U.N. Doc. A/9411 (1973); 2 B. FERENCZ, *supra* note 69, at 40.

73. See J. STONE, *supra* note 67, at 81-83.

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The final language of subparagraph 3(g) emerged as a compromise between these two positions.⁷⁴ The Definition starts by condemning the “sending” of armed groups. The U.S. language condemning the “organizing, supporting, or directing” of armed groups was dropped. Instead, the prohibition was extended to “substantial involvement” in the activities of the armed groups.

Both elements of the UN Definition are broadly supported by the writings of publicists.⁷⁵ In addition, the World Court has made it clear that adoption or ratification alone of the acts of non-governmental actors makes those actions attributable to the state.⁷⁶

a. *Direction and Control*

It is well established, and indeed common sense, that the actual direction and control of irregular armed bands by a state give rise to liability of that state for their actions.⁷⁷ In discussing the activities of rebels in a civil war, Brownlie writes: “If rebels are effectively supported *and controlled* by another state that state is responsible for a ‘use of force’ as a consequence of the agency.”⁷⁸ This point, however, is not limited merely to civil wars. It applies to all uses of force. The particular composition of the actual attackers is inconsequential. Thus, even “[t]he use of volunteers under governmental control for launching a military campaign or supporting active rebel groups will undoubtedly constitute a ‘use of force.’ It is the question of government control and not the label ‘volunteer’ or otherwise which is important.”⁷⁹ Whether a state controls and directs the activities of the armed groups depends on the facts of the particular situation. In discussing the factors that determine whether or not a state has control over a group of alleged volunteers, Brownlie lists the following: “numbers, central direction, size of offensive launched, and identification of formations and divisions, . . . source of equipment, the origin of the command under which the forces operate, and an absence of disavowal by the government of the state of origin.”⁸⁰

74. See *id.* at 75; 2 B. FERENCZ, *supra* note 69, at 40.

75. See, e.g., *infra* notes 77-80 and accompanying text.

76. See *infra* note 136 and accompanying text.

77. See, e.g., Ago, *supra* note 35, at 262-67.

78. See I. BROWNLIE, *supra* note 44, at 370 (emphasis in original).

79. *Id.* at 371-72 (footnote omitted). This emphasis on direction or control is shared by other publicists. As Piotrowski writes, “*l’emploi de la force par voie d’une action organisée à l’intérieur du pays à l’aide de l’Etat étranger, au moyen de saboteurs, instructeurs, meneurs et techniciens de provenance étrangère ou instruits à l’étranger, constitue bien un casus d’agression indirecte.*” Piotrowski, *supra* note 51 (emphasis in original); see also E. ARONEANU, *supra* note 51, at 91-92.

80. Brownlie, *Volunteers and the Law of War and Neutrality*, 5 INT’L & COMP. L.Q. 570, 574 (1956) (footnote omitted).

Under Brownlie's analysis, the United States has exercised and is exercising control over the activities of the mercenary forces in Nicaragua, and is thus using force against Nicaragua. Each of the factors Brownlie cites is present. Although the mercenaries represent a large, well-organized force of 15,000 men,⁸¹ and their offensives often involve several hundred soldiers,⁸² the "central direction" of the mercenary forces has come from Washington.⁸³ Their equipment comes primarily from the United States, either directly or funneled through a network of third parties.⁸⁴ Indeed, the United States exercises direction and control at every level of the mercenary army's activities, from the most minute details of the behavior and performance of individual mercenaries, to the broadest issues of deciding what goals to pursue and how to achieve them.

At the command level, the United States determines the leadership of the mercenary army. In 1982, the U.S. decided that the mercenary forces needed to "repackage" the mercenary leadership to improve its political image.⁸⁵ Accordingly, it interviewed candidates, selected the new leaders, and unveiled them in a press conference in Miami in December, 1982.⁸⁶ The U.S. told the mercenary leaders what they should say in public in order to make a favorable impression on Congress and the American people.⁸⁷ The U.S. paid the mercenary leaders and housed many of them in Miami.⁸⁸ For those mercenary leaders based in Central America, the CIA devised plans to resettle them in the U.S. should such a contingency become necessary.⁸⁹ Finally, leaders who displeased the U.S. were dismissed.⁹⁰

At the organizational level, the United States has recruited mercenaries and set the pay scale of leaders and foot soldiers alike.⁹¹ Moreover, the U.S. has regulated the size of the mercenary forces and has established both the amount and the pace of growth.⁹² Every major increase in the size of the mercenary forces has reflected a policy decision made in Washington.⁹³ The Reagan Administration's initial request for

81. Wall St. J., Mar. 6, 1985, at 1, col. 1.

82. See, e.g., Brody, Attack by the Nicaraguan "Contras" on the Population of Nicaragua 23 (Mar. 1985) (on file with the *Yale Journal of International Law*).

83. Wall St. J., Mar. 5, 1985, at 1, col. 1.

84. *Id.*; N.Y. Times, Jan. 13, 1985, at A1, col. 6.

85. Wall St. J., Mar. 5, 1985, at 1, col. 1.

86. *Id.*; L.A. Times, Mar. 4, 1985, at I1, col. 1.

87. L.A. Times, Mar. 4, 1985, at I1, col. 1.

88. Wall St. J., Mar 5, 1985, at 1, col. 1.

89. N.Y. Times, June 27, 1984, at A1, col. 2.

90. Wash. Post, Nov. 27, 1984, at A14 col. 4.

91. Wall St. J., Mar. 5, 1985, at 1, col. 1.

92. *Id.*; L.A. Times, Mar. 5, 1985, at I1, col. 1.

93. See *supra* notes 7-20 and accompanying text.

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congressional funding in late 1981 called for a force of 500 mercenaries.⁹⁴ In the fall of 1982, the CIA recommended a substantial increase in mercenary force levels.⁹⁵ By the end of 1984, the CIA had achieved this goal by expanding the force to 15,000 men.⁹⁶ In the summer of 1985, the Administration persuaded Congress to provide \$27 million in "humanitarian" aid to the mercenaries; the new funding was promptly followed by an upsurge in mercenary attacks.

At the operational level, the United States has directed and continues to direct the training of the mercenary forces by CIA personnel.⁹⁷ U.S. advisors instruct the mercenaries generally on the principles of guerrilla warfare, and specifically on what weapons to use and how to use them.⁹⁸ Through the *Psychological Warfare Manual* and the CIA sabotage booklet, *The Freedom Fighter's Manual*, the U.S. has even sought to advise the mercenaries as to how they should act.⁹⁹ U.S. advisors help the mercenaries plan their missions and often accompany them, assuming supervisory roles.¹⁰⁰ Finally, the U.S. does not allow the mercenaries to control their own weapons or logistics.¹⁰¹

At the tactical level, the United States has exerted control over the mercenaries. The CIA originally urged the mercenaries to launch conventional attacks in an attempt to seize and hold Nicaraguan territory.¹⁰² Later, the U.S. decided that guerrilla tactics would be more effective against Nicaragua and told the mercenaries to change their tactics accordingly.¹⁰³ In addition, the CIA has selected targets for the mercenary raids and directed air strikes against these targets.¹⁰⁴ It has also instructed the mercenaries on which methods of violence they should employ.¹⁰⁵ In sum, the day-to-day conduct of the war has been directed by CIA personnel under the overall supervision of CIA Director William Casey.¹⁰⁶ Indeed, as one Administration official remarked, "It's really Casey's war."¹⁰⁷

94. L.A. Times, Mar. 3, 1985, at I1, col. 1.

95. Wash. Post, May 5, 1983, at A1, col. 1; Wash. Post, May 8, 1983, at A1, col. 1.

96. Wall St. J., Mar. 6, 1985, at 1, col. 1.

97. *Id.*; Wash. Post, Apr. 7, 1984, at A1, col. 1.

98. See L.A. Times, Mar. 3, 1985, at I1, col. 1; N.Y. Times, Dec. 3, 1984, at A6, col. 3.

99. See CIA, PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE (Cong. Research Service trans. 1984) (on file with the *Yale Journal of International Law*); CIA, THE FREEDOM FIGHTER'S MANUAL (on file with the *Yale Journal of International Law*).

100. N.Y. Times, Oct. 16, 1983, at A1, col. 4.

101. Wall St. J., Mar. 5, 1985, at 1, col. 1.

102. N.Y. Times, Apr. 3, 1983, at A1, col. 3.

103. L.A. Times, Mar. 4, 1985, at I1, col. 1; Wash. Post, Apr. 7, 1984, at A24, col. 2.

104. Wall St. J., Mar. 6, 1985, at 20, col. 1; N.Y. Times, May 3, 1984, at A11, col. 1.

105. See CIA, PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE, *supra* note 99.

106. Wash. Post, Dec. 16, 1984, at A1, col. 1.

107. *Id.*

At the level of military strategy, the United States has dictated a program of sabotage and decided upon the class of targets it wishes the mercenaries to attack. It has also chosen when and where the mercenaries should launch invasions into Nicaragua.¹⁰⁸

At the level of political and organizational strategy, the United States has worked to unite the opposing factions of mercenaries and to improve their political image.¹⁰⁹ In addition, the U.S. has formulated a plan to cripple the Nicaraguan economy.¹¹⁰ Also, it made the decision to embark on a program of psychological warfare.¹¹¹

Close control over the activities of the mercenaries has been an essential element of U.S. policy. Administration officials have repeatedly assured Congress that the United States is in control. In December 1982, for example, one of the aides to CIA Director Casey testified that the CIA had "firm control" over the mercenary operation.¹¹² The U.S. has taken decisive steps to maintain this control. After Argentina pulled its advisors out of the mercenary operation, the U.S. decided to manage the program directly and sent in its own advisors.¹¹³ From that time on, the U.S. has steadily increased the number of these advisors.¹¹⁴ On occasion, American helicopters, flown by U.S. personnel, have been used to obtain better command and control at the operational level.¹¹⁵ Furthermore, the CIA has threatened to withhold supplies and training unless the mercenaries accept its advice.¹¹⁶

U.S. direction and control of *contra* operations is so complete that, as former *contra* leader Edgar Chamorro stated in testimony presented to the I.C.J.:

When I agreed to join the F.D.N. in 1981, I had hoped that it would be an organization of Nicaraguans, controlled by Nicaraguans, and dedicated to our own objectives which we ourselves would determine. I joined on the understanding that the United States Government would supply us the means necessary to defeat the Sandinistas and replace them as a government, but I believed that we would be our own masters. I turned out to be mistaken. The F.D.N. turned out to be an instrument of the United States Government and, specifically, of the C.I.A. It was created by the C.I.A., it was supplied, equipped, armed and trained by the C.I.A. and its activities—both political and military—were directed and controlled by the C.I.A.

108. See *supra* notes 104-06 and accompanying text.

109. See *supra* notes 85-87 and accompanying text.

110. Wall St. J., Mar. 6, 1985, at 1, col. 1 (mining of harbors designed to "stop shipping in Nicaragua").

111. See CIA, PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE, *supra* note 99.

112. Wash. Post, May 8, 1983, at A11, col. 1.

113. Wall St. J., Mar. 5, 1985, at 1, col. 1.

114. L.A. Times, Mar. 4, 1985, at I1, col. 1.

115. Wall St. J., Mar. 5, 1985, at 1, col. 1.

116. N.Y. Times, Apr. 18, 1984, at A1, col. 2.

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Those Nicaraguans who were chosen (by the C.I.A.) for leadership positions within the organization—namely, Calero and Bermudez—were those who best demonstrated their willingness to unquestioningly follow the instructions of the C.I.A. They, like the organization itself, became nothing more than executioners of the C.I.A.'s orders. The organization became so thoroughly dependent on the United States Government and its continued support that, if that support were terminated, the organization would not only be incapable of conducting any military or paramilitary activities against Nicaragua, but it would immediately begin to disintegrate. It could not exist without the support and direction of the United States Government.¹¹⁷

b. *Substantial Involvement*

The second branch of the concept of aggression embodied in paragraph 3(g) of the Assembly's definition—that of "substantial involvement" in the use of armed force against another state—finds equally broad support. The principle goes at least as far back as the historic Alabama Claims Arbitration decided in 1872.¹¹⁸ In that case, Great Britain was charged with outfitting, arming, equipping, and supplying Confederate cruisers during the American Civil War to prey on Union shipping. As a result of Great Britain's substantial involvement in this activity, the tribunal awarded "a sum of \$15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States."¹¹⁹

The same position was confirmed more recently by the former President of the I.C.J., Jimenez de Arechaga. He asserted that states "violate the prohibition on the use of force [when they] organize, instigate, assist or participate in 'acts of civil strife.'"¹²⁰

Of course, the U.S. direction and control of the mercenaries' paramilitary activities against Nicaragua described above¹²¹ constitute, *a fortiori*, "substantial involvement" in the mercenaries' operations. The intimate involvement of the U.S. is also demonstrated by its role in furnishing the men, money, materiel, and support facilities essential to the mercenaries' operations.

The United States has provided men for the mercenary movement by recruiting in Honduras and in the United States and by training soldiers

117. Affidavit of Edgar Chamorro (Nicar. v. U.S.), 1985 I.C.J. Pleadings (Case Concerning Military and Paramilitary Activities in and Against Nicaragua) (Affidavit dated Sept. 5, 1985) (on file with the *Yale Journal of International Law*).

118. 1 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 653 (1898).

119. *Id.* at 658.

120. Jimenez de Arechaga, *supra* note 3, at 115; see also Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641 (1984).

121. See *supra* notes 77-117 and accompanying text.

once they enlist.¹²² The role of the U.S. has been even more central in financing the mercenary program; it has openly allocated and supervised the expenditure of approximately \$100 million from 1981 to the present.¹²³ Each new congressional authorization of funds for the program has resulted in a surge of mercenary activities.¹²⁴ Conversely, congressional refusals to continue funding have been followed by dire assertions that the mercenary movement cannot survive without U.S. support.¹²⁵

The materiel furnished by the United States ranges from helicopters and combat planes to small arms to uniforms and boots.¹²⁶ Military hardware that was originally the property of the U.S. Air Force was transferred to the mercenaries through the CIA.¹²⁷ Furthermore, the U.S. has encouraged and assisted private groups in funnelling war supplies to the mercenaries.¹²⁸ To move the equipment to the mercenaries—both that provided by the CIA and that furnished by private U.S. groups—the United States has conducted large lift operations involving Navy ships, Air Force planes, and at least one private cargo airline.¹²⁹

In addition, the United States has furnished the mercenaries with support facilities. In Honduras, there has been a massive effort to improve military installations such as army bases and airfields, many of which have been used by the mercenaries.¹³⁰ Moreover, the United States has put sophisticated intelligence facilities at their disposal to conduct surveillance of the Nicaraguan forces.¹³¹

Subparagraph 3(g) of the Assembly's Definition of Aggression says that, in order to qualify as "aggressive," acts carried out by armed groups must be "of such gravity as to amount to"¹³² invasion or attack, military occupation, bombardment, blockade of the ports or coast of a state, and the like. Thus minor incidents are not considered a use of force under the rubric of subparagraph 3(g).¹³³ There can be, however, no doubt that the mercenaries' activities fall within the prohibition of 3(g). To recite only gross figures, the military attacks of the mercenaries have resulted in over 3,600 Nicaraguans killed, over 9,200 maimed,

122. Wall St. J., Mar. 5, 1985, at 1, col. 1.

123. See *supra* note 5.

124. N.Y. Times, Jan. 16, 1984, at A10, col. 1.

125. See President's News Conference of May 22, 1984, 20 WEEKLY COMP. PRES. DOC. 747 (May 22, 1984).

126. See N.Y. Times, Jan. 13, 1985, at A1, col. 6; Wash. Post, Sept. 18, 1984, at A1, col. 6; Wash. Post, Sept. 5, 1985, at A1, col. 2.

127. See *supra* note 126; see also N.Y. Times, July 25, 1983, at A1, col. 6.

128. Wash. Post, Sept. 15, 1984, at A1, col. 2; N.Y. Times, Sept. 11, 1984, at A1, col. 5.

129. N.Y. Times, July 15, 1984, at A1, col. 2.

130. Wash. Post, Jan. 31, 1985, at A27, col. 1; N.Y. Times, Jan. 13, 1985, at A1, col. 6.

131. TIME, Apr. 23, 1984, at 27, col. 2.

132. Definition of Aggression, art. 3(g), *supra* note 63.

133. See A. RIFAAT, *supra* note 50, at 274.

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wounded, raped, or kidnapped, and enormous amounts of property damage.¹³⁴ Without a doubt, the standard of substantial U.S. involvement in the activities of the mercenaries has been fully satisfied.

c. *Adoption and Ratification*

Finally, the United States, on the highest authority, has repeatedly adopted, ratified, and approved the acts of the mercenary forces in and against Nicaragua. One of the most extreme examples is President Reagan's affirmation in a radio address on February 16, 1985, that "[t]hey are our brothers [T]heir fight is our fight."¹³⁵

Under international law, such adoption and ratification constitutes still another basis for attributing the actions of the mercenaries to the United States for the purpose of determining its legal liability. In the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the International Court of Justice said:

[T]he policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government, was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these acts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.¹³⁶

The President's statement of February 16, 1985, is the most striking of the many statements by senior administration officials adopting, approving and ratifying the activities of the mercenaries against Nicaragua. President Reagan himself repeatedly refers to these mercenaries as "freedom fighters" and tells the American public that it has a duty to support them.¹³⁷

Indeed, these ratifications go beyond the actions of the mercenaries themselves. The Administration has also encouraged and facilitated the activities of private parties in supplying men, money, and materiel to mercenary forces in the field. Two American citizens (one a member of the Alabama Air National Guard) who had joined the mercenaries by

134. L.A. Times, Jan. 26, 1986, at V5, col. 1.

135. Radio Address to the Nation, 21 WEEKLY COMP. PRES. DOC. 187 (Feb. 16, 1985).

136. *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 35 (Judgment of May 24).

137. See Radio Address to the Nation, *supra* note 135, at 186-87.

this route were killed in a helicopter attack on Nicaraguan territory.¹³⁸ When challenged on these matters by the press, President Reagan defended and embraced these private actions as "quite in line with what has been a pretty well established tradition in this country."¹³⁹

In this manner, the United States, by adopting, approving, and ratifying the acts of the mercenary forces and the private efforts to support and assist them, has "translated" their acts and conduct "into the acts of the State."¹⁴⁰

C. *Use of Force Violates "Territorial Integrity and Political Independence"*

The phrase "against the territorial integrity or the political independence of any State" was inserted in the text of Article 2(4) precisely to ensure that the illegality of the use of force against either of these sovereign attributes would be indisputable. This provision was intended to safeguard the continued sovereign existence of member states.

The Dumbarton Oaks draft of the UN Charter contained no specific reference to political independence and territorial integrity as essential attributes of national sovereignty.¹⁴¹ The omission did not go unnoticed however. In comments submitted prior to the San Francisco Conference, many of the smaller states, including virtually all of the Latin American states, proposed amendments designed to ensure the explicit protection of these attributes in the Charter.¹⁴²

The amendment finally adopted was proposed by Australia.¹⁴³ The Deputy Prime Minister, Mr. Francis M. Forde, after reviewing the substance of the proposed amendment, stated the rationale for it as follows: "The application of this principle should insure that no question relating to a change of frontiers or an abrogation of a state's independence could be decided other than by peaceful negotiation."¹⁴⁴

138. N.Y. Times, Sept. 15, 1984, at A12, col. 1.

139. Wash. Post, Oct. 27, 1984, at A15, col. 1.

140. See Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 35 (Judgment of May 24).

141. See Dumbarton Oaks Proposals for a General International Organization, ch. II, para. 4, Doc. 1, G/1, 3 U.N.C.I.O. Docs. 1, 3 (1945).

142. See Doc. 215, I/1/19, 6 U.N.C.I.O. Docs. 557-68 (1945) (list by states of proposed amendments to ch. II).

143. Doc. 382, I/1/19, 6 U.N.C.I.O. Docs. 303 (1945).

144. Doc. 20, P/6, 1 U.N.C.I.O. Docs. 174 (1945). This rationale was echoed by Dr. Herbert Evatt, Minister for External Affairs and head of the Australian Delegation. H. EVATT, THE UNITED NATIONS 18-19 (1948).

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There can be no question that the use of force by the United States, as described above, is against both “the territorial integrity” and “the political independence” of Nicaragua. The U.S. has deliberately violated Nicaraguan airspace hundreds of times—often with high-performance aircraft for the purpose of producing sonic booms to intimidate the population—and has admitted to having intruded with armed vessels into Nicaraguan territorial waters. It is self-evident that these actions are, as a matter of law, flagrant assaults on Nicaragua’s territorial integrity.

Similarly, the U.S. actions in supporting the mercenaries are openly and unequivocally directed against the “political independence” of Nicaragua. As defined by Professor Myres S. McDougal:

Impairment of “political independence” . . . involves substantial curtailment of the freedom of decision-making [of the target state] through the effective and drastic reduction of the number of alternative policies open at tolerable costs to the officials of that state. It may further consist of an attempt to reconstruct the process of decision in the target state, to modify the composition or membership of the ruling elite group, and, perhaps, to dislodge that group completely and substitute another more acceptable to the attacking state.¹⁴⁵

The foregoing quotation is a strikingly accurate description of the admitted objectives of U.S. policy in Nicaragua. The United States has frankly stated that its objective in supporting the mercenaries is to overthrow the Nicaraguan government. Two years ago, the U.S. Ambassador to Nicaragua, Anthony C. Quainton, stated that the object of U.S. policy was “to try and modify [the] behavior [of the Nicaraguan government] in some substantial ways which are consistent with our interest and our vital security concerns throughout Central America.”¹⁴⁶ This same formula—maintaining pressure to force a change in Nicaraguan policies—has been reiterated repeatedly by U.S. officials, including President Reagan, as the objective of the elaborately orchestrated U.S. program of activity. It should be recalled that this program of coercion includes not only the actual use of force, but also almost continuous military maneuvers by thousands of U.S. troops near Nicaragua’s borders and powerful naval flotillas off its shores. The U.S. admits that these military operations are part of a program of “perception management” designed to intimidate the Nicaraguan government and keep it on continuous alert against a possible direct invasion by U.S. forces.¹⁴⁷ Military deployments

145. McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L.J. 1057, 1101 (1959). See also Jimenez de Arechaga, *supra* note 3, at 113.

146. N.Y. Times, July 25, 1983, at A1, col. 6.

147. N.Y. Times, Mar. 30, 1985, at A1, col. 2; Wash. Post, Nov. 1, 1984, at A33, col. 6.

are backed up by economic pressures such as: (a) the termination of all economic assistance to Nicaragua in 1981 and the repudiation of a \$9.8 million food credit;¹⁴⁸ (b) the 90-percent cut in the Nicaraguan sugar quota in 1983, officially determined to be a violation of U.S. international obligations under the General Agreement on Tariffs and Trade (GATT);¹⁴⁹ (c) the veto of support by multilateral financial agencies such as the International Monetary Fund and the Inter-American Development Bank;¹⁵⁰ and (d) the trade embargo imposed on May 1, 1985.¹⁵¹ In light of the above actions and the stated purposes behind these actions, there can scarcely be a clearer instance of a use of force directed against the political independence of another state.

III. The Use of Force by the United States against Nicaragua Cannot Be Justified as an Exercise of Self-Defense

Although the United States refused to defend its actions before the International Court of Justice, some Administration officials have attempted to justify U.S. support for the *contras* on various ill-defined theories of self-defense. For a considerable time, the United States publicly maintained the fiction that the purpose of its armed actions and support for the mercenaries was to interdict traffic in arms allegedly proceeding from Nicaragua to rebels fighting against the government of El Salvador. Occasional remarks by U.S. officials have referred to such interdiction as an exercise of the right of collective self-defense, presumably in association with El Salvador.¹⁵²

As will be shown herein, the allegations made by the United States, even if true, would not support a self-defense claim under Article 51 of the UN Charter and thus would not constitute an exception to Article 2(4) of the Charter prohibiting the use of force. Given the policy orientation of the Reagan Administration, such a claim would not only be disingenuous, but it would also lack legal force for failing to meet the armed force attack and reporting requirements of Article 51.

The prohibition against the use of force in Article 2(4) of the Charter is categorical. The only exception to this prohibition, other than collective measures authorized by the Security Council, is the inherent right of individual or collective self-defense in case of armed attack, preserved

148. N.Y. Times, Oct. 22, 1984, at A10, col. 1.

149. 28 GATT FOCUS, Mar.-Apr. 1984, at 1; *see also* N.Y. Times, Oct. 22, 1984, at A10, col. 2.

150. N.Y. Times, Oct. 22, 1984, at A10, col. 2.

151. Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985).

152. Wash. Post, Apr. 13, 1984, at A18, col. 5; N.Y. Times, Apr. 9, 1984, at A1, col. 3.

under and restricted by Article 51.¹⁵³ This general view of the interrelationship between Article 2(4) and Article 51 has the overwhelming support of international law publicists around the world.¹⁵⁴

The classic example of an impermissible use of force under this view is the attempt to overthrow or coerce the government of another state that is for some reason not acceptable to the acting state. Whatever may be the extent of the self-defense exception, it cannot be stretched to cover the use of force for this purpose.

Even the minority of publicists who contend that Article 51 does not define or limit the right of self-defense, but simply preserves a pre-existing right, agree that the very concept of self-defense is inconsistent with the use of force against the political independence of another state. Bowett, who is perhaps the leading exponent of this non-restrictive view of Article 51, agrees that the core of the concept is the protection of "essential rights from irreparable harm in circumstances in which alternative means of protection are unavailable."¹⁵⁵ In no sense can the use of force by the United States against the political independence of Nicaragua over the last four years be regarded as the only available means of protecting essential rights from irreparable harm.

More frequently, proponents of a non-restrictive view of Article 51 define self-defense with respect to Daniel Webster's well-known formulation in the *Caroline* case: a government alleging self-defense must show a "necessity of self-defense [that is] instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹⁵⁶

Here again it is evident that there is not now and never has been any threat by Nicaragua to the United States or any other country necessitating an instant, reflexive response. Under the *Caroline* formula there must be "no moment for deliberation," but the United States has had more than four years to deliberate about "the choice of means" for its Nicaragua policy. After first considering the open use of military force

153. J. BRIERLY, *THE LAW OF NATIONS* 415 (1963).

154. See, e.g., Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L & COMP. L. 1, 6 (1980); Bishop, *General Course of Public International Law*, 115 HAGUE RECUEIL 151, 436-37 (1965); I. BROWNLIE, *supra* note 44, at 81, 278; L. HENKIN, *HOW NATIONS BEHAVE* 136-37 (1968); H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 797 (1966); 2 L. OPPENHEIM, *INTERNATIONAL LAW* 154 (H. Lauterpacht ed. 1952); Skubiszewski, *The Postwar Alliances of Poland and the United Nations Charter*, 53 AM. J. INT'L L. 613, 619-22 (1959); Verdross, *Idées Directrices de l'Organisation des Nations Unies*, 83 HAGUE RECUEIL 1, 14-15 (1953); Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 529 (1956).

155. D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 11 (1958).

156. *The Caroline Case*, 2 J. MOORE, *DIGEST OF INTERNATIONAL LAW* 409, 412 (1906). See also Higgins, *supra* note 47, at 301-02; Schachter, *supra* note 120, at 1633-45; Waldock, *The Use of Force in International Law*, 81 HAGUE RECUEIL 455, 496-98 (1952).

to achieve its objectives, the decision was made to organize and deploy the mercenaries, then to supplement their efforts with the mining of the Nicaraguan harbors and direct attacks by CIA employees and hired saboteurs against targets inside Nicaragua, and ultimately to expand the guerrilla force to 15,000 men and to engage in a policy of intimidation and "perception management."¹⁵⁷ Over this entire period, the United States has—in a measured, calculated and deliberate manner—steadily intensified the application of force against Nicaragua. For this reason, the *Caroline* formula can find no application in this case.

Public admissions by U.S. officials make clear that under any interpretation of Article 51, U.S. actions against Nicaragua over the last four years cannot have been taken in self-defense. The United States has repeatedly, unequivocally, and on the highest authority acknowledged that its purpose in supporting and directing military and paramilitary activities in and against Nicaragua is to overthrow the government of Nicaragua or to force it to change its present structure. Such a purpose is wholly incompatible with any justification on the grounds of self-defense.

On February 21, 1985, President Reagan was asked whether the removal of the Sandinista government was a goal of his policy. He replied, "Well, remove in the sense of its present structure."¹⁵⁸ Again, in the same interview, when asked, "[A]ren't you advocating the overthrow of the present government?" he said, "Not if the present government would turn around and say, all right, if they'd say, 'Uncle.'"¹⁵⁹ In light of these statements, earlier references by U.S. spokesmen and legal representatives as to the purpose of arms interdiction or the justification of self-defense stand exposed as cynical pretexts for a policy of naked and blatant intervention in the affairs of Nicaragua.

In retrospect, it can be seen that the references to self-defense were manufactured solely to bolster the U.S. position in *Nicaragua v. United States*.¹⁶⁰ They began to emerge at or about the time Nicaragua's application in that case was filed. Before that, although there was much talk of arms interdiction, it was not placed in the legal category of the justification of self-defense. Moreover, since the United States has withdrawn from the case, references to self-defense have all but ceased.

On a factual level, it must be recognized that the allegations concerning supply and assistance by Nicaragua to the rebels in El Salvador are

157. See, e.g., N.Y. Times, Apr. 17, 1985, at A1, col. 5; N.Y. Times, Mar. 30, 1985, at A1, col. 2; Wall St. J., Mar. 5, 1985, at 1, col. 1.

158. President's News Conference of Feb. 21, 1985, *supra* note 4, at 212.

159. *Id.* at 212-13.

160. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment of Jurisdiction and Admissibility (dated Nov. 26), 1984 I.C.J. 392.

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simply untrue. Not surprisingly, the United States has failed to produce any credible evidence either before the International Court of Justice or in any public forum to substantiate its allegations. In view of the enormous financial and technical resources available to the U.S. intelligence community, the absence of any evidence is a striking confirmation of Nicaragua's position. In fact, the available evidence refutes the U.S. charges and supports Nicaragua's assertion that it has not provided military supplies and assistance to the Salvadoran rebels.¹⁶¹

David C. MacMichael, a CIA employee who for a period of two years had overall responsibility in the Agency for assessing and analyzing all evidence of arms traffic through Nicaragua, has stated:

The whole picture that the Administration has presented of Salvadoran insurgent operations being planned, directed and supplied from Nicaragua is simply not true. . . . [T]he Administration and the CIA have systematically misrepresented Nicaraguan involvement in the supply of arms to Salvadoran guerrillas to justify its efforts to overthrow the Nicaraguan government.¹⁶²

Mr. MacMichael testified before the International Court of Justice that during his employment with the CIA from 1981 to 1983, there was no credible evidence that the government of Nicaragua was shipping arms to the rebels in El Salvador, notwithstanding the extensive and sophisticated intelligence methods employed by the United States precisely to detect any such arms traffic. Mr. MacMichael described the evidence that was publicly adduced by the United States on this subject as "very scanty." "Much of it," he continued, "is unreliable, some of it is suspect, and I believe it has been presented in a deliberately misleading fashion on many occasions."¹⁶³

This assertion has been substantiated by Pentagon officials and American diplomats.¹⁶⁴ In addition, a number of independent investigations conducted by American newspapers have failed to discover any evidence of the alleged arms flow.¹⁶⁵ It is hard to believe that if there were any substantial transfer of arms from Nicaragua to El Salvador it could be successfully concealed from all these investigative efforts.

161. L.A. Times, June 16, 1984, at I1, col. 5.

162. N.Y. Times, June 11, 1984, at B6, col. 3.

163. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), I.C.J. Verbatim Record, CR 85/21, Sept. 16, 1985, at 22 (Testimony of David MacMichael) (on file with the *Yale Journal of International Law*).

164. Wash. Post, Jan. 18, 1986, at A21, col. 6; Boston Globe, June 10, 1984, at A1, col. 4.

165. L.A. Times, June 16, 1984, at I1, col. 5; Boston Globe, June 10, 1984, at 1, col. 1; Christian Science Monitor, May 2, 1984, at 2, col. 3.

President Reagan's press statement of February 21, 1985, advocating a change in the "structure" of the Nicaraguan Government, marked the abandonment of the pretense that the United States was recruiting, financing, training, supplying, and directing the *contras* over the past four years for the sole purpose of "interdicting" the alleged flow of arms from Nicaragua to El Salvador. It had become apparent long before then, however, that the oft-repeated interdiction claim was, for the following reasons, simply a sham:

(a) The very first National Security Council documents accompanying the plan initially approved by President Reagan in November, 1981, included the following statement of purpose:

[To] [b]uild popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza; [to] [s]upport the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere; [to] [w]ork primarily through non-Americans to achieve the foregoing, but in some circumstances the CIA might (possibly using U.S. personnel) take unilateral paramilitary action against special Cuban targets.¹⁶⁶

(b) The CIA provided military and financial support to Eden Pastora, whose forces were based in Costa Rica—to the south and far from any potential weapons routes to El Salvador—and whose stated objective was the overthrow of the Nicaraguan government.¹⁶⁷

(c) The mining of Nicaragua's harbors in February and March of 1984 had purposes other than the interdiction of weapons traffic. Senator David Durenberger, a member of the Senate Intelligence Committee and a supporter of aid to the mercenaries, said that the decision to undertake the mining was based on the need to step up actions against Nicaragua "to some higher level with some specialized activity that would put economic pressure" on the government.¹⁶⁸

(d) Similarly, the preparation and dissemination in 1983 of a manual giving instructions for attacking and terrorizing civilians and civilian targets were evidently unconnected with the objective of arms interdiction. The manual specifically directs the guerrillas to "kidnap . . . officials . . . of the Sandinista government" and "to neutralize carefully selected and planned targets," including judges, politicians, and state security officials.¹⁶⁹

166. Wash. Post, May 8, 1983, at A11, col. 3.

167. L.A. Times, Mar. 3, 1985, at I1, col. 1.

168. Newsday, Apr. 19, 1984, at 3.

169. See CIA, PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE, *supra* note 99, at 12, 14.

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(e) The many attacks carried out against civilians and a wide range of economic targets, from coffee harvests to oil storage facilities, bear no relation to arms interdiction.

The striking earlier discrepancy between the Administration's public words and its private deeds is overwhelmingly confirmed by former mercenary leader Edgar Chamorro. The CIA officials, he said, "always told us the objective was to overthrow the government in Managua. . . . They always said the President of the United States wants you to go to Managua."¹⁷⁰

Thus, the evidentiary record shows conclusively that self-defense in any guise, whether as defined under Article 51 or otherwise, was simply not a factor in the Administrations's policy calculations. The support of the guerrillas was conceived from the start as a way of using force to put pressure on or to overthrow the government of Nicaragua in furtherance of U.S. national interests, as defined by the Administration. Moreover, U.S. policymakers were aware from the beginning that the use of force for such purposes could not be publicly justified even in conventional political terms, much less as an exercise of self-defense under the norms of international law. Accordingly, the Administration was forced to use "covert" action.

With his February, 1985 press conference, President Reagan closed the gap between what was publicly stated and what was privately known with regard to U.S. activities in Nicaragua. Every development since that time has served to confirm and reinforce the President's position as to the objectives of U.S. policy.¹⁷¹ Only last summer, the Reagan Administration campaigned for and won an additional \$27 million for funding the activities of the mercenaries during the current fiscal year.¹⁷² It now seeks an additional \$100 million in aid.¹⁷³ The express premise of both campaigns is that without such funding and other forms of U.S. support and involvement, the United States would be powerless to impose its will upon Nicaragua and to force it to comply with U.S. demands. This premise plainly negates the justification of self-defense under international law.

Even if arms interdiction had been the purpose of U.S. activities, however, the justification of self-defense under Article 51 could not be sustained. Article 51 provides that:

170. L.A. Times, Mar. 3, 1985, at I1, col. 1.

171. See *supra* notes 21-24 and accompanying text.

172. See *supra* note 21 (the funding was characterized as "humanitarian assistance").

173. See *supra* note 22.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.¹⁷⁴

The plain meaning of this Article limits the exercise of the right of self-defense to situations in which the actor is under armed attack. Henkin confirms this analysis:

Of course, in the abstract, "if an armed attack occurs," does not have to mean *only* if an armed attack occurs. But anyone reading the article, as a lawyer or as a layman, would read the article as permitting an exception only if an armed attack occurs. What draftsman or reader would say that a clause which permits self-defense if an armed attack occurs, really permits self-defense whether an armed attack occurs or not?¹⁷⁵

Labelled the restrictive interpretation of Article 51, the view espoused by Henkin is adhered to by a majority of publicists.¹⁷⁶ In his Hague lectures, Judge Manfred Lachs of the International Court of Justice affirmed both the validity and the importance of this interpretation: "'Armed attack'" must be ascertained; it must be clear that it was launched. With the present means of verification this should present no difficulties, but there must be no shadow of doubt, for practice has demonstrated that false alerts may occur: and they may lead to disaster."¹⁷⁷ Although Judge Lachs was referring specifically to nuclear weapons, the point is equally valid in this context. Any circumvention of the armed attack limitation endangers the peace and security of the international system, at the regional as well as the global level.

174. U.N. CHARTER art. 51.

175. Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 57 PROC. AM. SOC'Y INT'L L. 147, 166 (1963) (emphasis in original).

176. See, e.g., Alfaro, *La Question de la Définition de l'Agression*, 29 REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES 369, 374 (1951); Baxter, *The Legal Consequences of the Unlawful Use of Force Under the Charter*, 62 AM. SOC'Y INT'L L. PROC. 68, 69 (1968); Bishop, *supra* note 154, at 428; H. BRIGGS, *THE LAW OF NATIONS* 964 (1953); I. BROWNLEE, *supra* note 44, at 271; Chaumont, *Cours Général de Droit International Public*, 129 HAGUE RECUEIL 333, 403 (1970); Falk, *The New States and International Legal Order*, 118 HAGUE RECUEIL 47 (1966); L. HENKIN, *supra* note 154, at 139-45; H. Kelsen, *supra* note 154, at 54; Lachs, *supra* note 62, at 162; Lauterpacht, *The Legal Irrelevance of the "State of War,"* 62 PROC. AM. SOC'Y INT'L L. 58, 62 (1968); C. ROUSSEAU, *LE DROIT DES CONFLITS ARMÉS* 535-36 (1983); Scelle, *Quelques Réflexions sur l'Abolition de la Compétence de Guerre*, 58 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIQUE 5 (1954); Schachter, *supra* note 120, at 1633-35; Schwebel *supra* note 54, at 449.

177. Lachs, *supra* note 62, at 164.

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Perhaps the most striking example of the armed attack limitation on the right of self-defense is to be found in the deliberate refusal of the United States to justify its quarantine of Cuba during the Cuban Missile Crisis in terms of self-defense. Professor Chayes, who was Legal Advisor to the State Department during the crisis, writes that “[t]he self-defense argument . . . was never officially espoused in the Cuban affair. On the contrary, it was repeatedly and consciously rejected.”¹⁷⁸ He further explains that, although part of the reason for the U.S. position was its unwillingness to set a dangerous precedent, the larger “difficulty with the Article 51 argument was that it seemed to trivialize the whole effort at legal justification,” precisely because it would have allowed the United States to be judge in its own case.¹⁷⁹ The ultimate result would be that “[w]henever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible.”¹⁸⁰

If the United States refused to regard the Soviet placement of missiles in Cuba—nuclear warheads aimed directly at its territory—as an armed attack, the actions charged against Nicaragua must fall far below the requirement of Article 51. They do not involve the use of armed forces. Nicaraguan troops and other forces under its direction and control are not alleged to be operating outside its borders. It is not even asserted that Nicaragua is “substantially involved” in the rebel operations in El Salvador. All that the United States has alleged—without producing a shred of proof—is that Nicaragua has provided some conventional arms to the insurgents. Even if true, this would not amount to an “armed attack” under Article 51.

The justification of self-defense also fails because the procedural requirements stipulated in Article 51 for the exercise of the inherent right of self-defense have not been met. The Article provides that “[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council”¹⁸¹ This requirement is not merely a procedural formality, but rather an important additional limitation on the exercise of the right of self-defense. As Waldock explains: “[T]he exercise of the right of self-defence is made subject to the subsequent judgment and control of the international community. The individual State necessarily decides whether or not to use force in

178. A. CHAYES, *THE CUBAN MISSILE CRISIS* 63 (1974).

179. *Id.* at 65.

180. *Id.*

181. U.N CHARTER art. 51.

self-defence but the propriety of its decision is a matter for the United Nations.”¹⁸²

For example, pursuant to this conception of the reporting requirement, when the United States dispatched troops to Lebanon in 1958, President Eisenhower announced, “In conformity with the spirit of the charter, the United States is reporting the measures taken by it to the Security Council”¹⁸³ The United States has never made the slightest effort to fulfill the requirement in the present case.

Finally, it is universally agreed that the legitimate exercise of the right of self-defense under both customary international law and the Charter is subject to the requirement of proportionality.¹⁸⁴ The application of this requirement to the facts of the present case would necessarily limit U.S. activities to Salvadoran territory. Thus, Judge Lachs writes:

The counter-measures envisaged need not be identical in nature to those against which they are directed . . . but they should be *ejusdem generis*, are bound to be proportionate. For example, if the attack did not amount to incursion into the territory of another State, the same should be true of the corresponding act of self-defence.¹⁸⁵

Even if U.S. allegations of arms shipments to El Salvador were true, which they are not, the U.S. response is on a completely different scale. It comprises at least \$100 million in assistance to a mercenary army of 15,000 men operating in and against the territory of Nicaragua, a major commitment of U.S. military resources for logistics and other support, and attacks by air, land and sea against economic targets and the civilian population. This deliberate application of force at extreme levels of violence and brutality violates the proportionality requirement and as such is fundamentally incompatible with the very notion of legitimate self-defense.

IV. Conclusion

Article 2(4) was established in 1945 as an independent legal norm, binding by its terms on all members of the United Nations. Occasionally it has been argued, essentially on *rebus sic stantibus* grounds, that the prohibition against the use of force has been invalidated, since the UN machinery for collective security has not operated as originally envisioned. However, the validity of Article 2(4) was never intended and has never been seriously regarded as contingent on the successful workings of

182. Waldock, *supra* note 156, at 495.

183. Statement of President Eisenhower, 39 DEP'T ST. BULL., Aug. 1958, at 181.

184. See, e.g., I. BROWNLEE, *supra* note 44, at 261-64.

185. Lachs, *supra* note 62, at 164.

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the United Nations as an organization. Former President of the I.C.J., Jimenez de Arechaga, writing in 1958, maintained on the contrary that the separation of the Article 2(4) prohibition against the use of force from the enforcement provisions of Chapter VII represented one of the major strengths of the Charter:

*Este principio cuarto configura una obligación entre los Estados, que subsiste en toda su integridad a pesar de cualquier deficiencia o fracaso que pueda tener el mecanismo de las Naciones Unidas; a pesar de que el Consejo de Seguridad no adopte una decisión por culpa del veto, o por cualquier otra circunstancia, siempre continuará en vigor este precepto entre los Estados. Recuérdese que el Pacto Briand-Kellog [sic] no establecía mecanismo alguno: se limitaba a condenar la guerra y a renunciar a ella. Este párrafo 4., en sí, tiene tanta fuerza como el Pacto de París, y es mucho más perfecto desde el punto de vista técnico.*¹⁸⁶

Twenty years later, this analysis was confirmed by the passage of the UN Declaration on Principles of International Law Concerning Friendly Relations among States, which Jimenez de Arechaga describes as “confirming the independent validity and the continued force of this fundamental obligation [Article 2(4)] despite the failings and shortcomings of the machinery established in the Charter to maintain peace and security.”¹⁸⁷

Professor Henkin likewise writes:

[T]he draftsmen of the Charter were not seeking merely to replace “balance of power” by “collective security”; they were determined, according to the Preamble, to abolish “the scourge of war.” All the evidence is persuasive that they sought to outlaw war, whether or not the U.N. organization succeeded in enforcing the law or establishing peace and justice. And none of the original members, nor any one of the new members, has ever claimed that the law against the use of force is undesirable now that the United Nations is not what had been intended.¹⁸⁸

The International Court of Justice has unequivocally recognized the overriding validity of the norm against the use of force. In the now celebrated passage from the *Corfu Channel* case, it stated: “The Court can

186. E. JIMENEZ DE ARECHAGA, DERECHO CONSTITUCIONAL DE LAS NACIONES UNIDAS 80 (1958) (translation provided by the author):

This fourth principle constitutes an obligation among the States, that exists in all its integrity in spite of any deficiency or failure that the United Nations mechanism might have; in spite of the Security Council’s not adopting a decision due to the veto, or due to any other reason, this precept will always continue in effect among the States. Remember that the Briand-Kellogg Pact did not establish any mechanism: it was limited to condemning war and renouncing it. This paragraph 4, in itself, has as much force as the Paris Pact, and is much more perfect from the technical point of view.

187. Jimenez de Arechaga, *supra* note 3, at 88.

188. L. HENKIN, *supra* note 154, at 138.

only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, *whatever be the present defects in international organization*, find a place in international law.”¹⁸⁹

Since its inception, Article 2(4) has been the cornerstone, not only of the United Nations Charter itself, but of the international legal system constructed upon it. The Article was designed to establish the rule of law in international affairs by delegitimizing the rule of force, and to redress the unequal balance of power between great and small nations. Without it, as the Court has said, intervention would necessarily “be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”¹⁹⁰ It is significant that only in the forum of the International Court of Justice can Nicaragua face the United States as an equal, with the outcome of the dispute unaffected by the overwhelming military and economic power of its adversary. The refusal of the United States to appear before the Court demonstrates unequivocally the current U.S. preference for the rule of force over the rule of law.

189. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Judgment of Apr. 9) (emphasis added).

190. *Id.*